

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

I. INTRODUCTION

Plaintiffs Frank Ghiglione and Rodgers Trucking ("Plaintiffs") brought this action against Discover Property and Casualty Company et al. ("Discover" or "Defendants") alleging breach of contract and breach of the covenant of good faith and fair dealing based on Discover's conduct during its defense of Rodgers Trucking in a prior lawsuit. See Complaint, Ex. A.

Presently before the Court is Defendants' Motion for Summary Judgment. For the reasons stated herein, the Court hereby GRANTS Defendants' Motion for Summary Judgment. The Court also AWARDS Defendants' costs, subject to the Court's approval of Defendants' offer of proof to be submitted within 30 days of this order.

II. BACKGROUND

In 2003, Rodgers Trucking was insured by Defendant Discover.

1 Property and Casualty Company under a \$1 million automobile
2 liability policy. On May 9, 2003, a Rodgers Trucking vehicle
3 struck Mr. Eliseo Soria ("Soria") while he was riding a bicycle.
4 The police report stated that the truck driver caused the
5 collision. See Tarkoff Decl., Ex. M. Soria suffered significant
6 injuries and subsequently sued Rodgers Trucking in state court,
7 claiming several million dollars in damages.

8 After the accident, the insurance broker for Rodgers Trucking
9 reported the accident to Don Bullock at The Murata Group, the
10 third-party administrator ("TPA") for the claim. The TPA hired
11 Arenas Claims Consulting to investigate the accident. Arenas
12 conducted a scene investigation on May 16, 2003 and produced a
13 written report on May 27, 2003. See Tarkoff Decl., Ex. C, Bullock
14 Depo., 17-18. The TPA also retained Lenore Defiesta as defense
15 counsel in anticipation of Soria filing a lawsuit. See id. at 23-
16 24, 28-29. While investigating the claim, Discover authorized the
17 hiring of multiple experts to analyze the accident and approved
18 over \$150,000 in defense costs. See id. at 34, 54.

19 Defendants made several attempts to settle the case. On July
20 9, 2004, Defendants sent Soria three structured settlement
21 proposals prepared by the Bridge Settlement Corporation. See
22 Korte Decl., Ex. 3. Soria rejected the offers. See Bullock
23 Decl., ¶ 4. In addition, the parties engaged in multiple
24 mediation sessions before four different mediators. See Tarkoff
25 Decl., Ex. A, Korte Depo., 22, 29, 32, 49. During the settlement
26 negotiations Soria never made a demand at or below the policy
27 limits. See id. at 58-59. Each of the mediators suggested that
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1 Rodgers Trucking would have to make a monetary contribution to
2 facilitate settlement because the insurance policy was not large
3 enough to constitute a sufficient payment to Soria. See id. at
4 100-101.

5 Subsequently, when it appeared likely that the case would go
6 to trial, Defendants authorized the hiring of an additional
7 attorney, Kevin Cholakian, to be the lead trial attorney. See id.
8 at 111. Mr. Korte, the attorney for Rodgers Trucking, was
9 satisfied that the new attorney provided adequate representation.
10 See id.

11 Immediately prior to trial, the parties settled the Soria
12 case for \$1.2 million. Defendants agreed to pay \$1 million, the
13 full value of the insurance policy, and Rodgers Trucking agreed to
14 pay the remaining balance of \$200,000.00. See Tarkoff Decl., Ex.
15 B, Ghiglione Depo., 22; Korte Decl., Ex. 12. At deposition, Frank
16 Ghiglione agreed that when considering the final settlement
17 proposal he was not pressured by Discover or its attorneys. See
18 Ghiglione Depo., 32-33. Ghiglione made the decision to settle
19 after discussing the matter with Mr. Korte. See id. at 51.
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21 **III. LEGAL STANDARD**

22 Summary judgment is appropriate only "if the pleadings,
23 depositions, answers to interrogatories, and admissions on file,
24 together with the affidavits, if any, show that there is no
25 genuine issue as to any material fact." Celotex Corp. v. Catrett,
26 477 U.S. 317, 322 (1986). A genuine issue of fact exists when the
27 non-moving party produces evidence on which a reasonable trier of
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1 fact could find in its favor viewing the record as a whole in
2 light of the evidentiary burden the law places on that party.
3 See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252-56 (1986).
4 Summary judgment is therefore appropriate against a party "who
5 fails to make a showing sufficient to establish the existence of
6 an element essential to the party's case, and on which that party
7 will bear the burden of proof at trial." Celotex, 477 U.S. at
8 322-23. The more implausible the claim or defense asserted by the
9 opposing party, the more persuasive its evidence must be to avoid
10 summary judgment, see Matsushita Electric Industrial Co. v. Zenith
11 Radio Corp., 475 U.S. 574, 587 (1986), but "[t]he evidence of the
12 non-moving party is to be believed, and all justifiable inferences
13 are to be drawn in its favor." Anderson, 477 U.S. at 255.

14 Defendants removed this case to federal court under 28 U.S.C.
15 § 1441(b). Accordingly, this Court must apply California
16 substantive law to Plaintiffs' claims. See Erie RR v. Tompkins,
17 304 U.S. 64, 78 (1938).

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19 **IV. DISCUSSION**

20 **A. Defendants' Duties as Insurer**

21 The parties agree that Discover had a general duty to defend
22 Rodgers Trucking against Soria's claims. Upon learning of a
23 potential claim against the policyholder, "the insurer has a duty
24 to defend the insured in any action brought against the insured
25 seeking damages for any covered claim." Buss v. Superior Court,
26 939 P.2d 766, 773 (1997). The duty to defend "entails the
27 rendering of service, viz., the mounting and funding of a defense

1 . . . in order to avoid or at least minimize liability." Id. The
2 general duty to defend includes the obligation to defend the
3 action immediately and in its entirety. See id. at 775.

4 In addition, the insurer has a number of specific
5 responsibilities:

6 (1) to make immediate inquiry into the facts of any serious
7 accident as soon as practicable after its occurrence; (2) on
8 the filing of suit against its assured to employ competent
9 counsel to represent the assured and to provide counsel with
adequate funds to conduct the defense of the suit; (3) to
keep abreast of the progress and status of the litigation in
order that it may act intelligently and in good faith on
settlement offers.

10 Merritt v. Reserve Insurance Co., 110 Cal. Rptr. 511, 527 (Cal.
11 Ct. App. 1973). Defendants agree that they had the duty to
12 inquire immediately into the facts of the case, hire competent
13 counsel, provide counsel with adequate funding, and keep abreast
14 of the progress of the litigation. The Court finds that
15 Defendants fulfilled each of their duties.

16 Defendants satisfied the duty of immediate inquiry by taking
17 prompt action upon learning of the accident. The Soria accident
18 occurred on Friday, May 9, 2003. See Tarkoff Decl., Ex. M. On
19 Monday, May 12, Ron Mathews, the insurance broker for Rodgers
20 Trucking, reported the accident to the TPA who immediately hired
21 Arenas Claims Consulting to investigate the accident. See id.,
22 Ex. I. Arenas performed a full investigation of the scene and
23 produced a report on May 27, 2003. See id., Ex. C. By quickly
24 contacting and hiring the investigators, Defendants met their duty
25 to make immediate inquiry into the facts of the Soria accident.

26 Defendants also satisfied the duty to hire competent counsel.

1 Before Soria filed his personal injury claim, the TPA retained
2 Lenore Defiesta as defense counsel for Rodgers Trucking. See id.,
3 Ex. C at 24, 28-29. The TPA had worked with Defiesta on prior
4 insurance defense matters. See id., Ex. C. at 24. In other
5 cases, Defiesta served as defense counsel in five jury trials,
6 four of which involved personal injury claims. See Korte Decl.,
7 Ex. 13. Based upon this information and the other documents
8 attached to the Korte Declaration, the Court finds that Lenore
9 Defiesta was competent counsel for the Soria case. Moreover,
10 Defendants authorized the hiring of Kevin Cholakian as an
11 additional trial attorney when the case appeared headed to trial.
12 See Korte Depo. at 111. Even Plaintiffs' personal counsel, Mr.
13 Korte, agreed that Cholakian was capable of adequately
14 representing Rodgers Trucking. See id.

15 Defendants also provided adequate funding to the
16 investigators and defense attorneys. While defending Rodgers
17 Trucking, Discover authorized expenses for investigation and
18 litigation that exceeded \$150,000. See Tarkoff Decl., Ex. C at
19 54. Based on the recommendation of counsel, the TPA and
20 Discover's claim representative authorized the retention of
21 multiple defense experts. See id. at 34. Both Plaintiff
22 Ghiglione and Mr. Korte confirmed that every recommendation they
23 made regarding defense activity was approved by Defendants. See
24 Korte Depo. at 61-62; Ghiglione Depo. at 76. In light of
25 Discover's approval of all requested and relevant expenses,
26 Defendants satisfied their duty to provide counsel with adequate
27 funds to defend the Soria suit.

1 Defendants also satisfied their duty to keep sufficiently
2 abreast of the progress of the litigation. The TPA and
3 Defendants' attorneys continued to refine their understanding of
4 the case through additional investigation and participation in
5 numerous mediation sessions. See Korte Decl., Ex. 8; Korte Depo.
6 at 22, 29, 32, 49. Indeed, approaching trial, attorney Cholakian
7 produced a comprehensive Pre-Trial Report which summarized the
8 facts of the case and analyzed the potential outcomes. See
9 Tarkoff Decl., Ex. E. Thus, Defendants acted in good faith and
10 satisfied their duty to remain informed of the progress of the
11 litigation.

12 Plaintiffs assert that Defendants failed to meet their duty
13 to employ competent counsel. Plaintiffs' primary complaints
14 center around the timing of defense counsel's decision to reveal
15 the \$1 million policy limit to Soria in the hopes of settling the
16 case. Plaintiffs claim that this "placed stars in the eyes of the
17 injured party and fear in the plaintiff" despite the fact that the
18 limits of insurance coverage are discoverable under California
19 law. Opp'n, 6; see Cal. Civ. Proc. Code § 2017.210. Though
20 Plaintiffs disagree with some of defense counsel's strategic
21 decisions and the timing of certain disclosures, they have not
22 shown that Defendants should be liable for any alleged mistakes.

23 California courts have stated that insurance companies are
24 not liable for the potential missteps of retained counsel. "We do
25 not accept the claim that vicarious liability falls on one who
26 retains independent trial counsel to conduct litigation on behalf
27 of a third party when retained counsel has conducted the

1 litigation negligently." Merritt, 110 Cal. Rptr. at 526. Thus,
2 even assuming that defense counsel was negligent, Discover would
3 not be liable for the conduct of Defiesta or Cholakian.

4 In our view independent counsel retained to conduct
5 litigation in the courts act in the capacity of independent
6 contractors, responsible for the results of their conduct and
not subject to the control and direction of their employer
over the details and manner of their performance.

7 Id. Moreover, even the retained attorneys are not legally
8 responsible for good faith mistakes.

9 In view of the complexity of the law and the circumstances
10 which call for difficult choices among possible courses of
11 action, the attorney cannot be held legally responsible for
an honest and reasonable mistake of law or an unfortunate
selection of remedy or other procedural step.

12 Banerian v. O'Malley, 116 Cal. Rptr. 919, 925 (Cal. Ct. App.
13 1974). In light of the relevant precedent, the Court finds that
14 Defendants are not liable for the alleged mistakes described by
15 Plaintiffs. During the course of the investigation and
16 litigation, defense counsel acted competently and in good faith.
17 Though Plaintiffs' counsel might have tried the case differently,
18 the conduct of defense counsel does not give rise to liability.

19 **B. Plaintiffs' Cumis Claim**

20 Plaintiffs assert that their personal counsel, Mr. Korte
21 should have been retained by Defendants as cumis, or independent
22 counsel. Under California law, the duty to appoint independent
23 counsel materializes when a conflict of interest arises between
24 the insurer and insured. See Cal. Civ. Code § 2860(a). However,
25 "[n]o conflict of interest shall be deemed to exist . . . solely
26 because an insured is sued for an amount in excess of the
27 insurance policy limits." Cal. Civ. Code § 2860(b). Thus, the

1 fact that Rodgers Trucking was sued for an amount greater than the
2 \$1 million liability policy does not, in itself, give rise to a
3 duty to appoint independent counsel. "A mere possibility of an
4 unspecified conflict does not require independent counsel. The
5 conflict must be significant, not merely theoretical, actual, not
6 merely potential." Dynamic Concepts, Inc. v. Truck Insurance
7 Exchange, 71 Cal. Rptr. 2d 882, 887 (Cal. Ct. App. 1998). During
8 litigation of the Soria case, no conflict of interest arose
9 between Rodgers Trucking and Discover. At all times, Soria's
10 demands exceeded the \$1 million limit on Rodgers Trucking's
11 liability policy. As such, "it was to the advantage of both
12 appellant and respondent to minimize appellant's underlying
13 liability." Blanchard v. State Farm Fire & Casualty Co., 2 Cal.
14 Rptr. 2d 884, 887 (Cal. Ct. App. 1991). On the eve of trial, when
15 Soria proposed to settle the case for \$1.2 million and Plaintiffs
16 were willing to contribute the \$200,000.00 over the policy limits,
17 Discover willingly agreed to pay the full amount of the policy.
18 In the relevant precedent, proper claims for appointment of
19 independent counsel or bad faith involve the insurer's refusal to
20 settle. See J.B. Aquerre, Inc. v. American Guarantee and
21 Liability Insurance Co., 68 Cal. Rptr. 2d 837, 841 (Cal. Ct. App.
22 1997). Where, as here, the insurer readily agreed to pay the full
23 amount of the liability policy in order to settle the case, a
24 conflict of interest did not arise and Defendants were not
25 obligated to appoint Mr. Korte as independent counsel.

26 C. Plaintiffs' Decision to Settle

27 Plaintiffs' final contention is that Defendants breached the
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1 covenant of good faith and fair dealing by coercing Plaintiffs
2 into settling the case and contributing \$200,000.00. To prove
3 this claim, Plaintiffs must show that Defendants were
4 "unreasonably coercing an insured to contribute to a settlement
5 fund." Id. at 842. Contrary to Plaintiffs' assertions, the
6 record contains no evidence of coercion. In their depositions,
7 both Mr. Ghiglione and Mr. Korte stated that they discussed
8 settling the case without any input or pressure from Discover or
9 defense counsel Defiesta and Cholakian. See Korte Depo. at 52-53;
10 Ghiglione Depo. at 31-33. The settlement discussions between
11 Ghiglione, Korte, and Soria's attorney occurred on a Sunday, two
12 days after the case was assigned to trial and without input from
13 defense counsel. See Korte Depo. at 41; Korte Decl., Ex. 12. Mr.
14 Ghiglione testified that he made the decision to settle in order
15 to eliminate the risk that Rodgers Trucking would be found liable
16 for a higher amount at trial. See Ghiglione Depo. at 66. Mr.
17 Ghiglione's decision to contribute \$200,000.00 to the settlement
18 came after Defendants made diligent efforts to settle the case
19 within the \$1 million policy limit, but found this impossible in
20 light of Soria's demands. See id. at 80. Mr. Korte testified
21 that Soria never made a settlement demand of less than \$1 million
22 and all the neutral mediators opined that a contribution from
23 Rodgers Trucking would be necessary for settlement. See Korte
24 Depo. at 58, 100-01. The testimony of Ghiglione and Korte
25 indicates that Defendants never coerced Plaintiffs into settling
26 or making a contribution to the case. As a result, Plaintiffs'
27 claims that Defendants unreasonably coerced a settlement fail as a
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1 matter of law.

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3 **V. CONCLUSION**

4 For the reasons described herein, the Court GRANTS
5 Defendants' Motion for Summary Judgment. The Court also AWARDS
6 Defendants' costs, subject to the Court's review and approval of
7 Defendants' offer of proof to be submitted within 30 days of this
8 order.

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10 IT IS SO ORDERED.

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12 Dated: March 29, 2007

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14 UNITED STATES DISTRICT JUDGE